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In the
# Supreme Court of the United States

JOSEPH JESNER, *et al.*,

*Petitioners,*

vs.

ARAB BANK, PLC,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF OF *AMICI CURIAE* UNITED STATES SENATORS SHELDON WHITEHOUSE and LINDSEY GRAHAM IN SUPPORT OF PETITIONERS

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## Statement of Interest[1]

This brief *amicus curiae* is respectfully submitted by Senator Lindsey Graham (R-SC) and Senator Sheldon Whitehouse (D-RI). As Chair and Ranking Member, respectively, of the Crime and Terrorism Subcommittee of the Senate Judiciary Committee, *amici* are actively engaged in enactment of legislation, oversight of Executive Branch departments, and fact-gathering on foreign affairs and the financing of terrorism overseas. *Amici* therefore understand the role of U.S. courts in helping victims hold funders of terrorism accountable for these horrific acts.

Moreover, as members of the Legislative Branch, *amici* believe that liability under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, for corporations that use U.S. operations to fund the murder of civilians abroad is an integral component of Congress's comprehensive approach to counterterrorism policy. The ATS, enacted during the United States' founding era, reflects the Framers' acknowledgment and Congress's longstanding view that the foreign policy of the United States must address dynamic conditions overseas. *Cf.* The Federalist No. 41, at 257 (James Madison) (Clinton Rossiter ed., 1961) (observing that American governance and policy must address the "ambition ... [and] exertions of all other nations"). To inform their deliberations as legislators, *amici* have elicited information and analysis from academic

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[1] Rule 37 statements: Petitioners Joseph Jesner, et al. and respondent Arab Bank filed blanket consents to the filing of *amicus* briefs. No counsel for any party authored any part of this brief and no person or entity other than *amicus* funded its preparation or submission.

experts, concerned citizens and organizations, and members of the Executive Branch. Based on that investigation and deliberation, this brief explains why *amici* believe that the decision of the court below barring ATS liability for financial entities that manipulate U.S. operations to support terror overseas created a dangerous gap in the United States' counterterrorism framework.

## Summary of Argument

The Alien Tort Statute (ATS), 28 U.S.C. § 1350, plays a substantial part in Congress's plan for keeping U.S. financial instrumentalities off-limits to terrorist operations overseas. Congress has received unequivocal testimony from experts that international terrorism rests on a "foundation of money" and financial manipulation. *See* Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary, 101st Cong. 84 (1990) (hereinafter Subcommittee Hearing) (testimony of Joseph A. Morris, former General Counsel, U.S. Information Agency). ATS jurisdiction in this case would aid Congress's counterterrorism plan by deterring financial entities from using U.S. facilities to launder payments to the families of suicide bombers.

Over twenty years ago, Congress expressly found that the funding of terrorism violates international law. *See* Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 301(a)(2), 110 Stat. 1214, 1247 (1996) (AEDPA) (invoking the U.S. Constitution's Define and Punish Clause as source of power to "punish crimes against the law of nations" by expanding both civil and criminal remedies for the

"provision of material support to foreign organizations engaged in terrorist activity"). Congress also found that deterring the funding of terrorism fulfilled the United States' international obligations. *See id.* (noting that legislation was necessary "to carry out the treaty obligations of the United States"). Providing jurisdiction under the ATS for actions against *any and all* financial entities that use U.S. facilities to aid terrorism is vital to Congress's comprehensive plan for combating this international threat.

The need to deter financial support for terrorism under the ATS does not hinge on the juridical form selected by entities that provide that support. In related legislation, Congress has legislated accountability for corporations as well as individuals that fund terror. *See* Anti-Terrorism Act (ATA), 18 U.S.C. § 2333(d)(1) (establishing liability for "any person who ... knowingly provid[es] substantial assistance to ... an act of international terrorism"), citing 1 U.S.C. § 1 (defining "person" to include, *inter alia*, "corporations, companies, associations, [and] firms").

Congress has long sought to deter both entities and individuals from providing assistance "at any point along the causal chain of terrorism." *See* S. Rep. No. 102-342 at 22 (1992). Legislative history affirms that this comprehensive scheme includes the ATS. *See* Subcommittee Hearing at 90 (testimony of Joseph A. Morris) (noting that proposed legislation, which became the ATA, would preserve ATS actions against "abuses of terrorism"). *See also* H.R. Rep. No. 102-367, at 3 (1991) (in explaining purpose of legislation that became Torture Victims Protection Act of 1991

(TVPA), 106 Stat. 73, note following 28 U.S.C. § 1350, providing a remedy for U.S. citizens victimized by official torture and extrajudicial killings, recognizing that ATS had "important uses and should not be replaced"); *id.* at 4 (recommending that ATS "should remain intact").

Congress has also worked closely with the Executive Branch to enhance remedies against state sponsors of terrorism and promulgate anti-terrorist financing measures in international agreements and organizations. As this Court recognized last Term, Congress has amended the Foreign Sovereign Immunities Act (FSIA) to provide civil remedies to victims injured by state sponsors of terrorism, such as Iran. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016). In addition, the U.S. Senate has approved the Convention on the Suppression of the Financing of Terrorism. Dec. 9, 1999, 2178 U.N.T.S. 229. *See* Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, §§ 201-203, 116 Stat. 721, 724-28 (2002); 18 U.S.C. § 2339C. Furthermore, Congress has supported successive administrations in sponsoring resolutions to deter terrorist financing at the United Nations Security Council. *See, e.g.*, S.C. Res. 2255, U.N. Doc. S/RES/2255 (Dec. 21, 2015); S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 4, 2004); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

ATS liability can help disrupt U.S.-based financial aid to terrorism. Subcommittee Hearing at 135 (comment by Sen. Grassley) (citing "money-laundering schemes that have been operated in the United States" by terrorist groups and their affiliates,

including "the use of apparently legitimate businesses as fronts"). Fair accounting principles are not a fixture in the terrorist's toolkit. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010) ("foreign terrorist organizations do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations"); *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004) ("terrorist organizations can hardly be counted on to keep careful bookkeeping records"). ATS actions can map the origins of terrorist funding in the U.S. and short-circuit the machinations of terrorism's financial enablers.

ATS liability for financial entities that use U.S. operations to fund terror will reinforce Congress's comprehensive framework. Congress has repeatedly legislated to address lacunae in the deterrence of terrorism. *See, e.g.*, Committee on the Judiciary, U.S. House of Representatives, 102d Cong., 2d sess., H. Rep. 102-240, at 5 (1992) (noting that Antiterrorism Act was enacted to address a "gap in our efforts to develop a comprehensive legal response to international terrorism"). The ATS is the sole predicate for civil actions against financial entities that use U.S. operations to aid terrorist attacks on foreign nationals overseas. Indeed, specific allegations that the defendant entity used its U.S. office to launder funds for Hamas are at the very core of this case. *See In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 150 (2d Cir. 2015) (noting allegations that, *inter alia*, defendant engaged in "routing the transfers [of money for the families of Hamas suicide bombers] through its New York branch

in order to convert Saudi currency into Israeli currency"); *Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 328-29 (E.D.N.Y. 2015) (holding that evidence at trial was sufficient to permit a reasonable jury to find these facts). The absence of ATS liability for such U.S.-based financial dealings will undermine the structure of deterrence that Congress has designed. Instead of reinforcing remedies at each link along terrorism's "causal chain," the court below opened a dangerous gap that terrorists and their funders may exploit.

A textual analysis also reinforces reading the ATS to encompass jurisdiction over actions against financial entities that use U.S. facilities to support terror. As Justice Frankfurter noted over half a century ago, "words of art" across statutes should generally receive a consistent reading. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). The phrase, "law of nations," used in both AEDPA and the ATS, is a term of art for international law. Pursuant to this canon, the range of parties contemplated under the ATS should track the parties identified under AEDPA, including terrorists' financial enablers.

## Argument

### I. The ATS is a Key Part of Congress's Comprehensive Framework to Deter Terrorist Financing That Uses U.S. Facilities

Practical, textual, and historical arguments support holding that the ATS's jurisdictional grant includes actions against financial entities that launder terrorist funds in the United States. Congress has long recognized that attacking terrorism's "causal chain" requires a dense latticework of deterrence. *See* S. Rep. No. 102-342 at 22. That latticework has myriad interlocking parts. Removing one slat from the framework opens a gap that frustrates Congress's design.

In AEDPA, Congress targeted the financial enablers of terrorism, prohibiting the knowing "provision of material support or resources" within the U.S. to either specific terrorist activity or groups designated as foreign terrorist organizations by the Secretary of State. *See* 18 U.S.C. § 2339A; *id.*, § 2339B; *see also id.*, § 956(a)(1) (in provision cross-referenced in § 2339A, prohibiting conspiracies in the U.S. to, *inter alia*, "commit at any place outside the United States an act that would constitute the offense of murder"). Under AEDPA, the United States has prosecuted both individuals and organizations for money laundering, fundraising, and other material support of foreign terrorist groups. *See, e.g.*, *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011) (upholding convictions of both putative charity and individuals that knowingly provided financial support to intermediaries on behalf of Hamas).

AEDPA broadened the civil deterrent that Congress had already provided in an earlier statute, the Anti-Terrorism Act (ATA), 18 U.S.C. § 2332 *et seq.* The ATA authorizes actions by U.S. nationals victimized by acts of "international terrorism," *see* 18 U.S.C. § 2333(a), Those legal actions impose liability on financial enablers of terrorism "where it hurts them the most: at their lifeline, their funds." 136 Cong. Rec. S14279-01 (daily ed. Oct. 1, 1990); 137 Cong. Rec. S4511-04 (daily ed. Apr. 16, 1991) (remarks of Sen. Grassley). Congress defined "international terrorism" to include "activities that ... involve acts *dangerous to human life* that are a violation of the criminal laws of the United States." 18 U.S.C. § 2331(1) (emphasis added). The financing of attacks on civilians is surely just such an activity, as the Seventh Circuit, in an opinion by Judge Posner, has found. *See Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690 (7th Cir. 2008) (en banc). As Judge Posner explained in a vivid analogy, "[g]iving money" to a foreign terrorist group, like "giving a loaded gun to a child," is an "act dangerous to human life" for which Congress intended to provide both criminal penalties and civil remedies. *Id.*; *see also id.* at 691 (finding that "suits against financiers of terrorism can cut the terrorists' lifeline").

Influential testimony on the bill that became the ATA reinforced Congress's understanding that the ATS authorizes actions against both entities and individuals that provide U.S.-related financial support to terrorist activity. That financial aid includes the money laundering in the U.S. at issue in this case. In declaring its aim to deter both entities and individuals from providing aid "at any point along the causal chain of terrorism" and to thereby "interrupt, or at least imperil, the flow of money" for

terrorist acts, S. Rep. No. 102-342 at 22, Congress adopted both the rationale and the *precise language* used by a distinguished witness, former U.S. Information Agency counsel Joseph A. Morris. *See* Subcommittee Hearing at 84 (observing that the "imposition of liability at any point along the causal chain of terrorism ... would interrupt, or at least imperil, the flow of terrorism's lifeblood: money"). Morris's testimony, which became a template for Congress's efforts, also flagged the importance of ATS jurisdiction.

In his persuasive testimony, Morris explained that the ATS encompasses "rights of action against the more egregious abuses of terrorism." Subcommittee Hearing at 90. Urging that Congress enact the remedies for *U.S. nationals* that became the ATA, Morris stressed that, under the ATA, ATS remedies "would be preserved" for *foreign nationals* who were victims of terrorism. *Id.* For Morris, the ATS and the bill that became the ATA were complementary: each eroded the "foundation of money" that supports international terrorism through U.S. financial operations. *Id.* at 84. As members of the U.S. Senate, *amici* share Morris's perspective.

## II. Textual Canons Support Reading the ATS to Encompass Suits Against Financial Entities That Use U.S. Operations to Support Terrorism

Textual canons also support construing cognizable ATS defendants to include financial entities that use U.S. facilities to support terror. Congress relies on interpretive canons, such as Justice Frankfurter's recommendation that "words of art" receive a consistent reading. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) (noting that terms of art "bring their art with them ... [t]hey bear the meaning of their habitat"). The phrase, "law of nations," used in both AEDPA and the ATS, is a term of art for international law. As Justice Story confirmed long ago, the Framers understood international law to be both subject to evolution and amenable to definition by Congress. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820) (explaining that the placement of the Define and Punish Clause in Article I of the Constitution resulted from the Framers' view that, since the "law of nations" could not be "completely ascertained and defined ... there is a peculiar fitness in giving [Congress] the power to define as well as to punish" offenses against the law of nations).

While the ATS became law in 1789, it is entirely appropriate to define permissible parties under the ATS with reference to acts, such as the use of U.S. operations to finance the murder of innocents abroad for political purposes, that Congress in a more recent enactment has declared to violate international law. *Cf.* Frankfurter, *supra*, at 543 (noting that later

statutes may "'throw a cross light' upon an earlier enactment") (citation omitted).

## III. Stopping the Flow of Money to Terrorist Groups Requires an ATS Remedy

As Congress recognized in AEDPA's material support provisions, the intricacy of many terrorist attacks requires recruitment, financing, and logistical aid from entities, not merely individuals. Financial aid, like that allegedly furnished by the defendants in this case, can take a complex path to avoid detection. Subcommittee Hearing 135 (comment by Sen. Grassley) (citing "money-laundering schemes that have been operated in the United States" by terrorist groups and their affiliates, including "the use of apparently legitimate businesses as fronts"). Moreover, Congress has long been aware that U.S. instrumentalities, such as the New York branch office maintained by the defendants in this case, can materially assist in the funding of terrorism. *Id.* at 135 (testimony of Daniel Pipes) (identifying the defendant as "by far the most powerful financial organization" linked to terrorism and citing its New York office as key to its role). Jurisdiction under the ATS that reaches such conduct furthers Congress's comprehensive framework.

Congress drafted the ATA as a "powerfully broad" complement to the ATS, "reaching behind the terrorist actors to *those who fund and guide and harbor them*." Subcommittee Hearing at 136 (testimony of Joseph A. Morris) (emphasis added). As Daniel Pipes, an expert on terrorism who also testified before Congress on the ATA, put it, "from a policy point of view ... it is absolutely critical to go after the funds because he who controls the funds controls the

organization ... [o]ne must strike at the heart of the organization, and that means going after the funding." *Id.* at 110. Congress understood that achieving that vital goal entailed liability under both the ATA *and* ATS for financial entities facilitating terrorist attacks like the attack in this case.

The special payments to the families of suicide bombers ("martyrs," in the terrorists' perverse parlance) that the defendants in this case allegedly helped collect and launder illustrate the function of financing in terrorist infrastructure. *See Arab Bank*, 808 F.3d at 149 (providing a detailed account of the plaintiffs' allegations). Those payments play a vital part in the recruitment and retention of terrorist operatives. *See Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc).

As Judge Posner found in *Boim*, payments to the families of so-called "martyrs" give terrorist leaders continued leverage over their minions. *Id.* (observing that for a terrorist group such as Hamas, martyr payments to families "make it more costly" for operatives to leave the organization, since their families would then "lose the material benefits" that the group funnels to their families); *see also United States v. Mubayyid*, 658 F.3d 35, 68 (1st Cir. 2011) (in affirming convictions for tax fraud related to fundraising for terrorism abroad, describing defendants' pitch for donations to "orphan whose father died in defense of the faith," and quoting expert testimony that if terrorist recruit "knows that if something should happen to him ... his family would be taken care of ... he's more likely to be able to go and fight"); *Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 329 (E.D.N.Y. 2015) (jury could reasonably find that

"the prospect that the families of dead Hamas terrorists would be financially rewarded was a substantial factor in increasing Hamas' ability to carry out attacks").

The specific allegations set out in the panel opinion of the court below document the power of such financial machinations and their connection to the United States. The defendant, using a New York branch that offered clearing and correspondent banking services, allegedly "deliberately helped ... terrorist organizations [including Hamas, Palestinian Islamic Jihad, the Al Aqsa Martyrs' Brigade, and the Popular Front for the Liberation of Palestine] and their proxies to raise funds for attacks and make payments to the families" of suicide bombers. *Arab Bank*, 808 F.3d at 149-50.

The elaborate process of financial support engaged in by the defendant started with its branches in Beirut and the Gaza Strip, where it maintained funds for Hamas accounts. *Id.* at 150. To ensure that the families of so-called "martyrs" received the special payments earmarked for them, the defendant received transfers from Saudi funds in the names of the beneficiaries. *Id.* It then routed the wire transfers through its New York branch, where it laundered the payments, changing Saudi currency into Israeli currency that would pass regulators' scrutiny. *Id.* Finally, the defendant made the payments, when claimants supplied the documentation that the defendant had specified. *Id.* This suite of services – including the use of facilities in the U.S. – was *exactly* the kind of lethally effective financial assistance to a terrorist entity that Congress has sought to deter.

The specific allegations against the defendant in this case illustrate U.S. facilities' lure to funders of both state and nonstate terrorism. That lure is part of a larger danger. In *Mustafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014), the court described specific, plausible claims that another financial entity had knowingly enabled payments through a New York escrow account that "included kickbacks" to Saddam Hussein's regime in Iraq. *Id.* at 190.[2] Similarly, in *Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201 (2d Cir. 2016), the court described specific, plausible claims that a financial entity used a New York correspondent bank for wire transfers that benefited Hezbollah in a period "leading up to ... rocket attacks" on Israel. *See id.* at 217.[3]

Terrorist funders' repeated use of U.S. facilities is a pervasive problem. Holding funders accountable is a major part of the solution. A comprehensive approach to accountability includes ATS jurisdiction over suits against terror groups' financiers. Because of the serpentine path that terrorist financing often takes, Congress recognized that the coordination required to disrupt financial facilitation entailed a major commitment from both government and the victims of terrorism. Detecting and disrupting the interlocking financial relationships that allow terrorist groups to

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[2] *But see Mustafa*, 770 F.3d at 194 (finding no ATS jurisdiction because defendants knowingly aided Saddam Hussein's regime but were not intentionally complicit in his human rights violations).

[3] *But see Licci*, 834 F.3d at 220 n. 13 (dismissing ATS claim solely because defendant was a corporation, while acknowledging specific claims that defendants' "domestic acts ... aided and abetted torts committed abroad").

motivate their suicide bombers – for example by "martyr" payments to families – requires a sustained effort. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 30 (2010) ("terrorist groups systematically conceal their activities behind charitable, social, and political fronts") (citation omitted). Navigating the money trail requires not merely the criminal and civil enforcement resources of the U.S. and other governments, but also private efforts.

Given Congress's judgment that such comprehensive efforts are necessary, it would be both self-defeating and dangerous for Congress to exempt terrorist funders that adopted a particular juridical form. Corporate entities, for example, possess the scale and expertise to devise convoluted financial stratagems that aid terrorism. *See Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33, 37, 48 (E.D.N.Y. 2007) (compelling discovery against global financial entity based on entity's maintenance of bank accounts in England for putative charity that U.S. government had found to be a "'principal' conduit" used by Hamas to "'hide the flow of money'"). To be comprehensive, Congress's framework includes juridical persons such as corporate entities, as well as other organizations and associations. *See, e.g., United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011) (upholding convictions of both putative charity and individuals who knowingly provided financial support to foreign terrorist group). The court below failed to acknowledge that exempting corporations from Congress's plan would leave gaps in the United States' comprehensive counterterrorism framework. Those gaps would transform Congress's solid anti-terrorism architecture into a patchwork of ill-fitting parts.

## IV. Cognizable Defendants Under the ATS Are Not Limited by the Provisions of the Torture Victims Protection Act

Because of the need to deter funding of foreign terrorist organizations, imposing limits on ATS jurisdiction that track the limits in the Torture Victims Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U.S.C. § 1350, would clash with Congress's overall counterterrorism plan. In the TVPA, Congress expressly limited cognizable defendants to "individual[s]." *Id.*, § 2(a); *cf. Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708-09 (2012) (holding that statutory term, "individual," refers only to natural persons, not entities). However, the TVPA's text and context contain limits not relevant to the ATS.

As this Court has observed, the TVPA's text repeatedly uses the word "individual" in settings where a natural person is the *only* common-sense referent. *Id.* at 1708. The TVPA's one-sentence liability provision refers four times to an "individual" as the *victim* of torture. *See* TVPA, § 2(a); *see also* § 3(b)(1) (referring six times to a victim of torture as an "individual"). As Justice Sotomayor noted in *Mohamad*, as a matter of physiology and logic "[o]nly a *natural person* can be a victim of torture or extrajudicial killing." *Mohamad*, 132 S. Ct. at 1708 (emphasis added). Legislative drafters would have to be contortionists of the first rank to pivot within a single sentence from a clear reference to "individual" natural persons as victims to a markedly different use of the *same term* to designate corporate entities as perpetrators. *Mohamad* simply acknowledged the

venerable rule that courts should not lightly impute such capricious drafting to Congress.

In contrast, the ATS does not trigger this common-sense precept of construction. The text of the ATS does not refer *at all* to defendants' nature, status, or identity; it only mentions defendants' *conduct* (a "tort ... committed in violation of the law of nations," 28 U.S.C. § 1350). Both natural and juristic persons can engage in tortious conduct. The ATS's text thus does not compel limiting defendants to natural persons.

The TVPA's legislative history indicates that Congress did not view it as modifying otherwise applicable understandings of the ATS's scope. The House report on the TVPA recognized that the ATS has "important uses and should not be replaced" by the TVPA or other legislation. *See* H.R. Rep. No. 102-367, at 3 (1991). The House report explained that the ATS "provides a remedy to aliens only" for torts entailing violations of international law. *Id.* at 4. Congress enacted the TVPA to implement a separate and distinct plan: providing a cause of action to U.S. citizens or their survivors to redress U.S. citizens' suffering from "[o]fficial torture and summary executions." *Id.*

Since claims under the ATS were not limited to the particular wrongs addressed by the TVPA, the House report recommended that the ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." *Id.* Congress affirmed terrorist financing's prohibition under international law a scant five years later, when it enacted AEDPA's § 301(a)(2). In light of Congress's appreciation for the ATS's different role, the TVPA's textual limits provide

"little guidance" regarding the proper construction of the ATS. *See Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 56 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013).

Moreover, the TVPA's textual limits stem from a legal concern not present in this case: the interaction between TVPA defendants and foreign sovereign immunity. *See Samantar v. Yousuf*, 560 U.S. 305, 313-19 (2010). Cases under the TVPA typically entail allegations against government officials. *See Yousef v. Samantar*, 699 F.3d 763, 766 (4th Cir. 2012) (noting allegations that defendant directed government agents to engage in torture of political opponents). Indeed, the administration of President George H.W. Bush opposed the bill that became the TVPA precisely because it might interfere with the "conduct of foreign countries and their officers." *See* Torture Victim Protection Act of 1989: Hearing on S. 2465 before the Subcomm. on Immigr. & Refugee Affairs of the S. Comm. on the Judiciary, 101st Cong. 9-10 (1990) (testimony of John O. McGinnis, Dep. Ass't Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice); *id.* at 19 (testimony of David Stewart, Ass't Legal Adviser for Hum. Rts. & Refugee Affairs, U.S. Dep't of State) (expressing concern about impact on "foreign governments or officials"). Congress's express limit on liability under the TVPA to "individual[s]" reconciled the statute with the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.*, which bars most suits against foreign states or state entities. *See id.*, § 1603.

Since torture is a violation of a fundamental *jus cogens* norm, international law regards it "by definition" as an act that is "*not* officially authorized

by the Sovereign" and hence does not trigger sovereign immunity. *See Samantar*, 699 F.3d at 776 (emphasis added). Imposing liability for torture only on *individual* officials under the TVPA was therefore completely consistent with both the facts of torture cases and with international law.

In contrast, ATS liability of *non-state* entities such as terrorism's corporate enablers does not undermine foreign sovereign immunity. Indeed, as Congress has specifically provided, both natural *and* juristic persons aid foreign terrorist groups and should be accountable for that assistance. *See* ATA, 18 U.S.C. § 2333(d)(1) (establishing liability for "any person who ... knowingly provid[es] substantial assistance to ... an act of international terrorism"), citing 1 U.S.C. § 1 (defining "person" to include, *inter alia*, "corporations, companies, associations, [and] firms"). To avoid gaps in accountability, the range of cognizable defendants in ATS actions based on acts of international terrorism should track the broad spectrum of defendants, including both natural and juristic persons, cognizable in actions under the ATA.

## V. The Ruling of the Court Below Leaves a Serious Gap in the U.S. Framework for Encouraging Global Cooperation to Deter Terrorist Financing

The holding of the court below opens a gap in U.S. global counterterrorism efforts. It also leaves a group of victims without a remedy. Each result undermines Congress's comprehensive framework to deter the use of U.S. facilities for the financing of terrorism.

In deterring the use of U.S. financial operations that aid terrorism, jurisdiction under the ATS is a crucial supplement to the ATA. Because the ATA only provides a right of action for *U.S. nationals* injured abroad, it does not deter financial entities that use U.S. operations to aid the killing of *foreign* nationals overseas. The absence of ATS jurisdiction would thus create a gap between respective remedies available to U.S. and foreign nationals. That gap would undermine Congress's express commitment to "international cooperation" in counterterrorism efforts. *See* AEDPA, § 301(a)(5), 110 Stat. 1247 (note following 18 U.S.C. § 2339B), cited in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 32 (2010).

As both Congress and this Court have long recognized, U.S. foreign policy hinges on reciprocity with other states. The Second Circuit, in a venerable decision upholding the Foreign Intelligence Surveillance Act against a challenge brought by convicted members of an international terrorist group, stated the point starkly: "[I]f other nations were to harbor terrorists and give them safe haven for staging terrorist activities against the United States, United States national security would be threatened. *As a reciprocal matter*, the United States cannot

afford to give safe haven to terrorists who seek to carry out raids against other nations." *United States v. Duggan*, 743 F.2d 59, 74 (2d Cir. 1984) (emphasis added). Under AEDPA, the same analysis applies to financial entities that exploit U.S. facilities to aid terrorism against other states' civilian populations.

A fading U.S. commitment to halting funding for terrorism will lead other states to discount the importance of international cooperation. *See Humanitarian Law Project*, 561 U.S. at 32 (noting importance of global cooperation and need to assure allies of the United States' continuing dedication to this goal). Because of this reciprocal dynamic, even financial support within the U.S. of terrorism that only injures other states' civilians will ultimately harm the United States. ATS jurisdiction over such abuse of U.S. financial systems thus safeguards U.S. nationals by incentivizing global cooperation in counterterrorism efforts.

This Court has long recognized the importance of global cooperation against lawbreaking. In *United States v. Arjona*, 120 U.S. 479 (1887), the Court held that Congress had the power under the Define and Punish Clause to prohibit activity within the U.S. to counterfeit foreign currencies, whether or not such activity directly harmed U.S. individuals. The Court noted that such prohibitions served both international law and U.S. interests, since the U.S. benefits from a sound financial system. *Id.* at 484 (citing noted international law scholar Emmerich de Vattel on the need for "wise and equitable commercial laws"). It is true that without ATS jurisdiction financial entities supporting terrorism with U.S. facilities might still be subject to criminal prosecution. However, the absence

of civil liability would hamper efforts to hold terrorists accountable. Jurisdiction under the ATS thus ensures that the U.S. has the full range of civil and criminal weapons available to combat international terrorism.

## VI. Congress Has Consistently Approved and Supported Transnational Measures to Deter Terrorist Financing

The framework of international cooperation that Congress and this Court have cited is not a fleeting fancy. Over time, it has yielded programs, statutes and concrete agreements with practical effects. Measures striking back at financial support for violations of international law date from World War II, and more recently have included U.N. Security Council resolutions and legislation to provide remedies against state sponsors of terrorism. The implementation of those measures has never been easy or automatic. Recent international efforts would be impeded by the absence of ATS jurisdiction over actions against financial entities that use U.S. facilities to assist terrorist groups.

The end of World War II saw a concerted effort rooted in international law to dismantle terror's financiers. The victorious Allied Powers, including the United States, relied on international law in demolishing the financial machinery that supported the Nazi regime's reign of state terror. Control Council Law No. 9, a legal framework established by the Allies pursuant to customary international law, broke up the notorious entity I.G. Farben, which had aided the Nazi regime's murderous program. *See Doe VIII*, 654 F.3d at 52 ("the Allies determined that I.G.

Farben had committed violations of the law of nations and therefore destroyed it").

The Nuremberg Tribunals agreed that actions taken jointly by the Nazi regime and supportive financial entities were violations of international law. For example, speaking *inter alia* of "juristic persons" such as entities that colluded with the Nazi regime, the Nuremberg tribunal asserted that, "Where private individuals, *including juristic persons*, proceed to exploit the military occupancy [created by Nazi Germany's illegal aggressive war] by acquiring private property against the will and consent of the former own, such action ... is in violation of international law ..." *Id.* at 53 (emphasis added). The tribunal continued: "The action of Farben ... cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich." *Id.* at 53.

The Allied Powers acted on the tribunal's insights by breaking up I.G. Farben. That forced dissolution, driven by a determination to enforce overarching *erga omnes* norms, constituted definitive state practice integral to international law.

These transnational efforts have continued apace in the current age of decentralized terrorist groups. Twenty years ago, Congress modified the doctrine of foreign sovereign immunity to allow civil actions by victims against state sponsors of terrorism such as Iran. *See* AEDPA, 110 Stat. 1214, 1241-43, § 221, 28 U.S.C. § 1605(a)(7). Since then, Congress has repeatedly augmented those remedies. For example, as part of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 3, 338, § 1083 (Jan. 28, 2008), Congress enacted a new

statutory provision, 28 U.S.C. § 1605A. This provision created an express right of action against state sponsors of terrorism and authorized the award of punitive damages. Congress has also enacted legislation to target the U.S. assets of state sponsors of terrorism and ensure that victims have access to those assets. *Cf. Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (upholding legislation empowering federal courts to designate specific Iranian assets in the U.S. as subject to execution of judgment by victims of Iran-sponsored terrorist attacks). The Second Circuit's contorted approach would hold individuals and even certain foreign governments liable for acts of international terrorism that violate customary international law, but would exempt "juridical entities" such as corporations that provide identical financial support to terrorist groups.

Moreover, the Second Circuit's approach would allow state sponsors to game the system, by funneling money into corporations that would act on terrorist groups' behalf. State sponsors of terror are adept at concealing their beneficial interest in private sector entities and assets. *See Bank Markazi*, 136 S. Ct. at 1319 (citing requirement in 22 U.S.C. § 8772(a) (2) that a court determine that Iran holds "equitable title to, or the beneficial interest in ... assets" prior to allowing execution of a judgment on those assets obtained by a victim of terrorism). Providing perverse incentives for such financial opacity is antithetical to Congress's plan.

To implement this plan on a global level, the U.S. has ratified and pushed for universal adoption of the United Nations' International Convention for the Suppression of the Financing of Terrorism, which

requires nations who are a party to the treaty to "adopt effective measures for the prevention of the financing of terrorism...."[4] The Convention calls for prosecution of any person who "directly or indirectly ... provides or collects funds ... in order to carry out" terrorist bombings or any "other act intended to cause death or serious bodily harm to a civilian ... to intimidate a population, or to compel a Government" to omit or commit any act. *Id.* Furthermore, the Convention requires that each State party "enable a legal entity located in its territory or organized under its laws to be held liable" when that entity has financed terrorist activity. *Id.*, Art. 5(1). As of this writing, 188 states have become parties to this Convention. *See* Chapter XVIII: Penal Matters, 11. International Convention for the Suppression of the Financing of Terrorism, *United Nations Treaty Collection,* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&clang=_en (last visited May 25, 2017).

The United States was instrumental in the adoption of United Nations Security Council Resolution 1267, which seeks to disrupt terrorist financing by imposing severe sanctions on both persons *and* entities that provide such financial support. After the 9/11 attacks, the U.S. worked with other members of the Security Council to enact Resolution 1373, which broadened the sanctions enacted under Res. 1267 and effectively made the

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[4] International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. Doc. A/RES/54.109 (Dec. 9, 1999); GAOR, 54th Sess., Supp. No. 49, at 408, U.N. Doc. A/54/49 (Vol.I) (1999), entered into force April 10, 2002.

Convention for the Suppression of the Financing of Terrorism "binding on all United Nations member states." *See* Beth Van Schaack, *Finding the Tort of Terrorism in International Law*, 28 Rev. Litig. 381, 411-12 (2008). Resolution 1373 requested that U.N. member states "complement international cooperation" on the prevention of terrorism by "taking additional measures to prevent and suppress ... through all lawful means, the financing and preparation of any acts of terrorism." *Id.* at 1. In addition, Resolution 1373 requires that member states "[p]rohibit ... entities ... from making any funds, financial assets or economic resources or financial or related services available, directly or indirectly, for the benefit" of "persons and entities" that commit terrorist acts. *Id.* at Art. 1(d). Prior to the issuance of Resolution 1373, the United States began designating individuals and entities as Specially Designated Global Terrorists under Executive Order 13224 (Sept. 23, 2001). *See* Office of Foreign Assets Control, *SDN by Programs*, https://www.treasury.gov/ofac/downloads/prgrmlst.txt (last visited May 25, 2017) (showing designations by program including the SDGT program).

The U.S. also plays a central role in the international Financial Action Task Force ("FATF"). FATF establishes standards for its members' financial systems, to deter money laundering and terrorist financing.[5] FATF evaluates its many member states on their efforts at deterrence and transparency.

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[5] Financial Action Task Force on Money Laundering, The Forty Recommendations, June 20, 2003 (incorporating the amendments of October 22, 2004).

As with the goals animating other components of the comprehensive counterterrorism framework, FATF's principles dovetail with ATS jurisdiction over financial entities that exploit U.S. facilities to fund terrorist attacks on foreign innocents abroad.

## Conclusion:

*Amici* herein believe that ATS jurisdiction over suits against both natural and legal persons is an essential component in Congress's comprehensive counterterrorism framework. Therefore, *amici* respectfully submit that the Court should reverse the decision of the United States Court of Appeals for the Second Circuit in this case and hold that the ATS encompasses actions against financial entities that use U.S. facilities to aid terrorism abroad.

Respectfully submitted,

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